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WILLIAM J. BYRNES
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August 26, 1996

Office of the Secretary
Federal Communications Commission
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: CC Docket No. 96-146

Dear sirs:

Transmitted herewith on behalf of Total Telecommunications, Inc., SaMComm, Inc. and Big Sky Teleconferencing, Ltd, are the original and nine copies of Comments in CC Docket No. 96-146, Policies and Rules Governing Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996 and CC Docket No. 93-22, Policies and Rules Implementing the telephone Disclosure and Dispute Resolution Act.

If you have any questions, please contact the undersigned.

Sincerely yours,

William J. Byrnes

William J. Byrnes

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Policies and Rules	)	
Governing Interstate Pay-Per-Call	)	CC Docket No. 96-146
and Other Information Services Pursuant to	)	
the Telecommunications Act of 1996	)	
	)	
In the Matter of	)	
	)	
Policies and Rules Implementing	)	CC Docket No. 93-22
the Telephone Disclosure and Dispute	)	
Resolution Act	)	

COMMENTS

Total Telecommunications Services, Inc., SaMComm, Inc. and Big Sky Teleconferencing, Ltd. hereby submit joint comments in response to the Order and Notice of Proposed Rule Making released July 11, 1996 (hereinafter "Order') in the above-captioned proceeding (FCC 96-289).

Each of these commenting parties is a new competitive local exchange carrier, which has recently entered the newly opened local exchange market that Congress and the Commission have decided should now be the subject of aggressive competition. They seek to explore new services in order to begin the difficult process of developing a customer base from zero in markets that have long been subject to stultifying monopoly control. They are particularly eager to make use of a variety of emerging information services that may increase the diversity of service offered to the public and increase the overall size of the local telecommunications market. They are concerned that a suggestion appearing in the

Commission's Order to "re-define" the subject matter of Section 228 of the Communications Act and of the Telephone Disclosure and Dispute Resolution Act would cripple such emerging service offerings, artificially divert remaining business to AT&T at the expense of the new and more imaginative competitors, and increase prices to consumers for the information services that are not totally eliminated.

I. THE "REDEFINITION" OF "PAY-PER-CALL SERVICES" IS ILLEGAL

A. The "Redefinition" is Contrary to the Plain Meaning of the Act

Section 228(1)(B) quite clearly and explicitly limits "pay-per-call services" to those "for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call." The Order, however, suggests redefining "pay-per-call" in a most expansive way so that "when a common carrier charges a telephone subscriber for a call to an interstate information service, any form of remuneration from that carrier to an entity providing or advertising the service, or any reciprocal arrangement between such entities, constitutes per se evidence that the charge levied actually exceeds the charge for transmission."[1]

The "Telephone Disclosure and Dispute Resolution Act" was designed as a consumer-protection measure that would prevent members of the public from being charged sums of money beyond ordinary transmission charges in circumstances in which they might not understand that such liabilities are being incurred. Under the Order's drastic "redefinition" proposal, the creation of a special charge for users of information service would no longer be the touchstone for invoking the Section 228. Instead of the effect on the consumer's pocket book, the touchstone

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[1]*See* NPRM, note 1 *supra*, at para. 48.

would become the contractual or tariff arrangements between the carrier and the information service provider.

The proposed description of carrier incentive payments to information service providers as "per se evidence" of premium charges to customers is inherently a non-sequitur. "Per se" means: "By itself; in itself; taken alone; by means of itself; through itself; inherently; in isolation; unconnected with other matters; simply as such in its own nature without reference to its relation."[2] Arrangements between carriers and information providers cannot by themselves constitute "per se" evidence that the charge to a third party exceeds the charge for transmission. There simply is no compelling logical nexus between the two. Evidence of whether a caller is being required to pay a "per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission" may take the form of information concerning rates paid for the subject call as compared to rates paid for similar transmissions, but the costs the carrier incurs do not per se cause its rates for particular calls to be greater than ordinary transmission rates. There are numerous instances in which carriers pay compensation to information providers and others to stimulate traffic on their systems for which no premium is exacted from customers.[3] The suggested definition does not involve "per se" evidence of the standard Congress has set, but rather establishment of a much broader and distinctly different policy.

There can be no "pay-per-call" when there is no payment for a call other than ordinary transmission charges. The "redefinition" can be viewed as a "redefinition" only in the sense

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[2] *Black's Law Dictionary,* Sixth Edition, 1990 at page 1142.

[3] *See* the examples discussed in Section II.A of these Comments below at pages 16 to 22.

used by the Red Queen in *Alice in Wonderland* that words were to mean what the Queen wanted them to mean. But in a world governed by law, words have definite meaning, and the words Congress carefully chose to use in framing the provision in question do not include what the proposed "redefinition" would encompass. Such "redefinition" is simply unlawful and beyond the Commission's authority. It is also, we suggest, very undesirable public policy that is inconsistent with the fundamental national telecommunications policy in favor of encouraging competitive service alternatives

B. Furnishing of Information Services at No Premium Achieves TDDRA's Goals

The limited scope of the Act is apparent from its title -- the "Telephone Disclosure and Dispute Resolution Act." The Act is directed to assuring that consumers have adequate disclosure when they may be charged rates in excess of ordinary common carrier transmission rates and that mechanisms are available to assure fair and equitable resolution of disputes engendered by confusion as to what was intended.

The consumer problems that Congress intended to be addressed are described at some length in House Report No. 102-430 of February 5, 1992 (102d Cong. 2d Sess.). The Congressional Report made abundantly clear that the "growth of non-deceptive uses of pay-per-call technology has been beneficial to consumers." (at 4). A fundamental purpose of the legislation was to protect "the future development of pay-per-call technology." (*Id.* at 1). It is not information service itself against which Congress legislated. It is certain deceptive practices made possible by the introduction of special charges.

The 1996 amendments were scarcely intended to reduce the procompetitive goal already reflected in the 1992 legislation. The limited role of the 1996 amendments are indicated in the title of Section 701 of the Telecommunications Act of 1996 in which they appear -- "Prevention of Unfair Billing Practices for Information or Services Provided Over Toll-Free Telephone Calls" and in the part thereof modifying the definition of "pay-per-call services" -- "Clarification of 'Pay-Per-Call Services.'" The purpose of the Act is to prevent unfair billing practices. It is not to prevent information services from being offered. The change in definition was to be a mere "clarification" and not a basic change in what was being regulated. Striking the reference in the exclusions provided in Subsection 228(i)(2) to eliminate the formalistic exception of services merely because they are tariffed is in the nature of a clarification. By contrast, the fundamental limitation in Subsection 228(i)(1)(B) to calls involving "charges greater than, or in addition to, the charge for transmission of the call" was maintained because that limitation reflects the whole essence of what Section 228 was intended to do -- prevent consumers from being charged in amounts and on occasions when they may reasonably have not expected to be incurring such charges.

Subsection 1 remains what it was in the original enactment of the Telephone Disclosure and Dispute Resolution Act of 1992. In Section 701 of the Telecommunications Act of 1996, all that Congress did with respect to the definition of "pay-per-call services" was to strike from the exclusions enumerated in Subsection 2 the previously existing phrase "or any service the charge for which is tariffed." Consistently, Congress decided to make no other alteration in Subsection 228(i)(1). Congress clearly chose **not** to delete the major part of the definition in Section 221(i) limiting "pay-per-call services" to calls "for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call."

Elimination of special charges for information services, by whatever means, achieves the fundamental goal of the Telephone Disclosure and Dispute Resolution Act more perfectly than creation of increased regulatory burdens on services for which special charges are imposed. The fact that carriers are willing to provide information services to the public without imposing premium charges upon callers should be a source of considerable satisfaction. To label such non-premium services, however, as "pay-per-call services" would result in imposing premium charges upon callers despite the willingness of competitive carriers to forego them since, under Section 228(b) of the Act, the services would need to be provided as 900 services with all the substantial premium charges attendant thereto.

The Commission would, in effect, be outlawing free service and requiring the public to pay charges the market does not require it to pay. Coercing the public into paying charges it does not need to pay has never before been a Commission policy. The proposed "redefinition" would therefore create the evil Congress found needed to be regulated in order to regulate it. The public should not be subjected to unnecessary charges merely on account of a misguided belief that making the public pay charges furnishes a basis for more effective control over the service. The instant proposal to suppress free telephone information service to the public in favor of a paid service is akin to the notion that the Commission should outlaw free over-the-air television because it could then regulate more pervasively what is being provided since members of the public would be required to go through a more readily regulatable process of paying for their video services. While a well established industry such as the broadcast industry would be sure to prevent such misguided policy from being adopted, the telephone information industry is an infant industry, which although less well known is all the less able to withstand such misguided regulatory extremes and requires more thoughtful reflection from the Commission itself.

Whatever goals might be achieved, in either case, by the more intensive regulation made possible by requiring payments, are not goals Congress has established and are not in the public interest.

To refer to the provision of information services without premium charges to callers as "circumventions" of the Act loses all perspective on what the Act was designed to address. It is regulation for the sake of regulation and contrary to the experience of generations that has led Congress and the Commission to pursue a fundamental policy of deregulation of communications services. If there is any "circumvention here, it is the highly anomalous and aberrant proposal set forth in the Commission's Order.

C. The Commission Lacks Authority to Alter the Statutory Definition

This proposal goes far beyond the captioned scope of Section B.4 of the items noticed for proposed rulemaking in which it appears. The section's caption is limited innocently enough (at p. 19) to redefinition to "remove the tariff services exemption" -- something that Congress clearly provided for in the 1996 amendments. The proposal in Paragraph 48, however, goes far beyond what Congress did and, in effect, seeks to remove the critical part of Congress's definition of "pay-per-call services" that Congress decided to keep.

In Section 228(i)(1) of the Act, The Commission defines "pay-per-call services" as:

> (1) The term "pay-per-call services" means any service --
>
> (A) in which any person provides or purports to provide
>
> (i) audio information or audio entertainment produced or packaged by such person;
>
> (ii) access to simultaneous voice conversation services; or
>
> (iii) any service, including the provision of a product, the charges for which are assessed on

> the basis of the completion of the call;
>
> (B) **for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call**; and
>
> (C) which is accessed through use of a 900 telephone number or other prefix or area code designated by the Commission in accordance with subsection (b)(5)."

(2) Such term does not include directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate, or any service for which users are assessed charges only after entering into a presubscription or comparable arrangement with the provider of such service.

[emphasis added].

The statutory definition in Section 228 of the Communications Act explicitly limits the term to services "for which the caller pays a per-call or per-time-interval charge that is greater than or in addition to the charges for transmission of the call." The Commission has no authority to alter this definition. To do so would be unlawful.

D. Section 4(i) Does Not Empower the Commission to Overturn Congress's Definition

In this mis-labeled proposal, the Commission seeks to change what Congress has already decided. The only basis it cites as justification for this extraordinary arrogation of power is Section 4(i) of the Communications Act. Section 4(i), however, gives the Commission no authority to alter Congress's definition. Section 4(i) does not give the Commission a veto of acts of Congress or any authority to re-write statutes. Section 4(i) is merely a procedural catch-all to enable the Commission to implement what Congress has decided.

In AT&T v. FCC, 487 F.2d 865 (2d Cir. 1988), the court concluded that the FCC lacked legal authority to alter the balance of interests already decided by Congress itself. In that case, the Court struck down a requirement that the Commission had imposed to control the problem of "pancaking" of one set of unlawful tariff rates upon another before the agency can reach its decision on the lawfulness of each. The FCC had required AT&T to obtain special permission before filing new tariff revisions with respect to tariff rates in hearing. Despite a strong argument by the Commission that such a step was necessary to permit it to discharge its responsibilities effectively to regulate rates of the monopoly carrier of the time, the Court found that the action was beyond the Commission's authority. The Court reasoned that:

> We start with the proposition that Congress, rather than purporting "to transfer its legislative power to the unbounded discretion of the regulatory body", FCC v. RCA Communications, Inc., 346 U.S. 86, 90, 97 L. Ed. 1470, 73 S. Ct. 998 (1953), intended a specific statutory basis for the Commission's authority. We also are mindful that Congress, in enacting the carrier initiated rate filing provisions of the Act, struck a "careful balance of interests", United States v. SCRAP, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254, 41 U.S.L.W. 4866, 4874 (1973), and intended that specific statutory authority, rather than general inherent equity power, should provide the agency with its governing standards.

487 F.2d at 872.

Similarly in MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985), the Court invalidated a Commission directive that carriers cease filing tariffs as beyond the legal authority it then had. The Court there declared (at 1195) that:

> In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.

The instant proposal, in essence, seeks to change a balance Congress has already specifically struck between the goal of encouraging the development of pay-per-call technology and its goal of protecting consumers from certain unfair charging practices. It is not a question of merely filling in procedural details of implementation. Congress has already defined the balance. The Commission is "not free to ignore or circumvent that balance."

The Commission showed accurate understanding of its obligation to implement and not change the balance Congress made when it stated in the TDDRA Report and Order, 8 FCC Rcd 6885, 6887 (1993), that:

> The proposed definition of pay-per-call services is being adopted unchanged. Congress has incorporated that specific definition into the Communications Act. This action reflects a consideration and balancing of interests by Congress that we will not disturb.[footnotes deleted].

It will be noted in this instance that, although Congress gave the FCC no authority to revise the statutory definition of "pay-per-call-services," it did accord the Federal Trade Commission authority to make changes in how the term is used in the FTC Act. The explicit grant of such authority to one agency makes the lack of such a grant to another agency -- the FCC -- all the more legally conclusive.[4]

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[4] Section 701 of the Telecommunications Act of 1996 amended 15 U.S.C. 5714 (1), with respect to the responsibilities of the Federal Trade Commission, to read:

> The term 'pay-per-call services' has the meaning provided in section 228(i) of the Communications Act of 1934, except that the Commission by rule may, notwithstanding subparagraphs (B) and (C) of section 228(i)(1) of such Act, extend such definition to other similar services providing audio information or audio entertainment if the Commission determines that such services are susceptible to the unfair and deceptive practices that are prohibited by the rules prescribed pursuant to section 201(a).

The FTC's discretion is limited to instances in which it can make a determination that similar information and audio services are susceptible to the unfair and deceptive practices it is

E. The Proposal is Beyond the Scope of TDDRA

Although Section 4(i) is the sole authority upon which the Commission seeks to rely in advancing its radical expansion of the definition of "pay-per-call services," we note a few passing statements in the Order that, although not explicitly advanced as justifications for the Commission's suggested redefinition, may be misleading to a casual reader and should therefore be corrected in any further Commission item.

In Paragraph 47 of the Order, there is a footnote reference to the Explanatory Statement, S. Rep. No. 104-230, explaining elimination of the tariff services exemption "to close a loophole in current law, which permits information providers to evade the restrictions of section 228 by filing tariffs for the provision of information services." (at 202). The tariffed service exclusion in Subsection 228(i)(2) was viewed as an evasion because it was a mere procedural step completely within the control of the offering parties and did not necessarily correspond to genuine substantive characteristics of the service. But Congress chose to keep the substantive standards of Subsection 228(i)(1), including the qualification that the caller must pay charge greater than or in addition to the transmission charge. That substantive criterion was integral to defining the specific danger Congress sought to address in TDDRA. There is nothing inconsistent in the legislative history or the with the plain meaning of the wording of Section 228 -- and, of course, even if there were, no inconsistent legislative history could overcome such unambiguous statutory wording.

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directed to curb pertaining to advertising and disclosures. The expansion of the definition applies only in the FTC Act controlling the activities of the FTC and does not alter the definition in the Communications Act controlling the scope of carrier regulation activities to which the FCC is limited.

We note also that elsewhere in its Order the Commission inaccurately describes the scope of what Congress has created for Section 228 and seeks to expand it into something far larger. In the very first sentence of the Order, the Commission seeks impermissibly to extend the scope of what Congress has done by claiming that the 1996 amendments to Section 228 of the Communications Act extended its scope from "interstate pay-per-call' services to "other information services." In footnote 2 to that sentence, the Commission declares that within "the context of Section 228 of the Communications Act, information services encompass not only pay-per-call services but, also, information and entertainment programs available through other dialing sequences."

Nowhere in the Act, however, does Congress equate information services with pay-per-call, let alone expand the definition as the FCC has attempted. Indeed, Section 228 does not even define its subject matter of "pay-per-call services" in terms of "information services." Instead, it is defined in terms of "audio information," "audio entertainment," access to simultaneous voice conversations," and any other services, irrespective of whether they happen to be information services "the charges for which are assessed on the basis of the completion of the call." The previously stated definition of "pay-per-call services" in Section 228(i)(1) is stated in terms of what was needed to achieve the statutory goal of preventing consumers from being charged something extra when they have no reasonable expectation of being subjected to such a charge. "Information services" are defined in Section 3(20) of the Communications Act so as to include the notion of "via telecommunications" by any means whatsoever and irrespective of whether charges are imposed on callers. Congress did not intend to reach so broadly in Section 228. It is quite clear in terms of the wording of the statute, as well as the legislative history, that only information services that gave rise to a specific danger of imposing charges unfairly upon consumers through particular deceptive charging mechanisms were being addressed. The Telephone Disclosure and Dispute Resolution Act is not a general hunting license to enable the agency to police, for whatever reasons, information services it may not like.

In an earlier part of its Order (Note 58), the Commission noted that, in reporting on another bill preceding TDDRA, the Senate Commerce Committee had mentioned its desire that the FCC and FTC have flexibility "in defining the scope of regulations." S. Rep. No. 102-190 at 12. The referenced report is not a part of the legislative history of the Telephone and Disclosure and Dispute Resolution Act. It pertained to the "900 Services Consumer Protection Act of 1991," which Congress did not enact. Whatever may have been meant by the remark, it is not relevant to the provisions of the more carefully considered bill that was enacted the following year. Nothing of this sort was said in the Report on the bill that became the Telephone Disclosure and Dispute Resolution Act of 1992. See H.R. Rep. 102-430 at 13. The specific statement with respect to the unsuccessful bill only makes the lack of any such statement with respect to the bill that became law all the more significant.

F. Content-Based Judgments Concerning Specific Services Do Not Justify "Redefinition"

The Commission's Order does not explicitly claim that content-based concerns justify the proposed redefinition of "pay-per-call services." We would not normally presume to comment upon a possible rationale not disclosed on the face of the agency's order, but the complete lack of any other rational basis for the proposed action, and several hints in the Order, as well as outside it, suggest that the matter be addressed in at least a preliminary way to avoid any possible misunderstanding. We apologize to the Commission in advance if content-based concerns have played no part in the advancement of this proposal, and suggest that, if that is the case, the Commission can simply so state in its decision, and disregard the remainder of this section of our comments. If, however, content-based concerns do play a part, we respectfully request that the Commission disclose them publicly and set forth in detail for further and far more detailed comment, the reasons, if any exist, why it believes that acting on such concerns is compatible with the First Amendment.

There is great basis for concern if, as it appears, the proposal is actually directed against indecency. Indecency was addressed neither in the text of the statutory provision at hand nor in its legislative history. It has been addressed in a variety of other Communications Act contexts many of which have not proven adequate to withstand judicial scrutiny. Such concerns should be addressed to the extent required in the context of the provisions of the Act specifically intended by Congress to address that question. Such weighty questions should not, and cannot legally, be addressed in the context of a provision of law intended to address a different type of concern.

Concerns about telecommunications indecency were expressed by Congress in Title V of the Telecommunications Act of 1996, which is also referred to as the "Communications Decency Act of 1996." Its provisions pertaining to telecommunications carriers are codified in Section 223 of the Communications Act of 1934. The lawfulness of these provisions are, to say the least, a matter of considerable Constitutional doubt. In American Civil Liberties Union v. Reno, E.D. Pa. No. 96-963, June 11, 1996, 1996 U.S. Dist. LEXIS 7919, the three-judge court, convened under Section 561 of the Communications Decency Act of 1996 to address such questions, enjoined the Government from "enforcing, prosecuting investigating or reviewing any matter premised upon" Sections 223(a)(1)(B) and 223(a)(2) "to the extent such enforcement, prosecution, investigation, or review are based upon allegations other than obscenity or child pornography."

It is well established that "indecency" (unlike obscenity) is constitutionally protected speech that often has substantial social value. Sable Comm. v. FCC, 492 U.S. 115, 126 (1989). Subject only to "narrow and well-understood exceptions, [the First Amendment] does not countenance governmental control over the content of messages expressed by private individuals." Turner Broadcasting System v. FCC, 114 S. Ct. 2445, 2458-59 (1994) (citing R.A.V. v. St. Paul, 112 S. Ct. 2538, 2547 (1992); Texas v. Johnson, 491 U.S. 397, 414 (1989)). The "indecency" and "patently offensive" provisions of Sections 223(a)(1)(B) and 223(d) are unquestionably content-based bans, and thus are presumptively unconstitutional. Content-based regulations of speech will be upheld only when they are justified by "compelling" governmental interests and "narrowly tailored" to effectuate those interests. See Turner Broadcasting System v. FCC, 114 S. Ct. at 2445; Simon & Schuster, Inc. v. New York State Crimes Victims Bd., 502 U.S. 105 (1991); Sable Comm. v. FCC, 492 U.S. 115, 126 (1989); Fabulous Assoc., Inc. v. Pennsylvania Pub. Util. Comm., 896 F.2d 780, 784 (1990).

The Supreme Court has applied strict scrutiny to content-based regulations because "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner Broadcasting System v. FCC, 114 S. Ct. at 2458. The censorship provisions of the Act have failed this strict scrutiny test.

Section 228, which was not even intended to address indecency let alone the "narrow tailoring" required to address it lawfully, would fail even the most permissive standard that has ever been suggested for judicial review of such matters. Content-based concerns cannot become legal merely by applying steps designed to stop messages sought to be suppressed to a great many other messages as well. That would be the antitheses of the narrow tailoring of remedies the law requires. Taken to its logical conclusion, it would lead to the suppression of all telecommunications since that probably is the only way of reliably stopping every message which some might find objectionable.

Indeed, the Supreme Court declared in Sable Comm. v. FCC, 492 U.S. at 126, that the government may regulate the content of constitutionally protected speech (which includes speech that is indecent but not obscene) "in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." When there has been no interest at all even articulated by either Congress or the agency, application of the Constitutional standard clearly invalidates the action. If an interest were articulated, it would then be necessary for the Commission to demonstrate that it was employing the "least restrictive means" to achieve the articulated interest. It is hard to imagine that an action restricting content across any broadly defined information provider category like all information service whatsoever could possibly be the "least restrictive means" of attaining any rational objective pertaining to decency.

To the extent that the proposed redefinition is prompted by a desire to suppress indecency, it is not only inconsistent with the statutory provision upon which it purports to rely and is inconsistent with the fundamental national policy favoring competition and service innovation in general and for information services in particular, it is an appalling affront to the most fundamental law of this land.

II. THE "REDEFINITION" IS CONTRARY TO SOUND PUBLIC POLICY

A. The "Redefinition" Would Unjustifiably Inhibit Creative Measures to Generate Traffic

Even if it were within the scope of the FCC's legal authority, the proposal would inhibit the development of creative arrangements for promoting traffic generation that the Commission has hitherto supported and which are the natural concomitant of a vigorously competitive marketplace. The Commission has recognized, in essence, that competing carriers need not be limited to developing business through in-house marketing staffs and its own advertising campaigns. Carriers are encouraged to use ingenuity in having other parties develop business for them. Such use of outsiders to develop business is particularly valuable to newer and smaller carriers that lack in-house marketing staffs. But such market stimulation incentives have been used successfully by carriers big and small.

Historically, common carriers have long paid marketing agents of various types commissions to generate traffic for which they charge the public. These have included hotels, hospitals, universities, private payphone owners and businesses on whose premises telephones are located. See AT&T's Private Payphone Commission Plan, 7 FCC Rcd. 7135 (1992); Telesphere International, Inc., 8 FCC Rcd. 4945 (1993).

In 1980, the Chief, Common Carrier Bureau sanctioned an arrangement between American Express Company and MCI whereby American Express marketed MCI's Execunet service to its credit card holders. Letter dated December 29, 1980, From Phillip L. Verveer, Chief, Common Carrier Bureau, to Laurance W. Secrest. Later in AT&T Opportunity Calling and Lexicom, Inc. v. AT&T Communications (E-84-28, April 1, 1985), 1985 FCC LEXIS 3583, the Bureau upheld AT&T's untariffed promotional offering of discounts with participating retailers for its long distance customers called "Opportunity Calling." In MCI v. AT&T, 7 FCC Rcd 5096 (1992), the Commission approved AT&T's use of "aggregators" to generate more 800 service business under its Revenue Volume Pricing Plan ("RSVP") and Customer Specific Term Plan ("CSTP").[5]

In AT&T's Private Payphone Commission Plan, 3 FCC Rcd 5834 (Com. Car. Bur. 1988), the Common Carrier Bureau held that AT&T may properly pay commissions to private payphone companies and that the commissions were legitimate business expenses for AT&T. In affirming the Bureau, the Commission ruled that the critical fact was that "the customer pays the full tariffed rate and the only relationship between the carrier and the payphone operator is an arms-length business operation." 7 FCC Rcd at 7136. AT&T apparently also pays selected audiotext service providers fees to stimulate the use of AT&T's telephone service. International Audiotext Network, Inc. v. AT&T, 62 F.3d 69 (1995).

Under MCI's Global Asset program, MCI pays audiotext service providers on a per-minute basis for generating international traffic on MCI's network. The overseas caller dials 1-150-XXX-XXXX to reach audiotext providers. MCI recognizes that, while program content may be similar to some international 900 services, there is no collection of a rate surcharge[6]. MCI sends a Remittance Payment to the information provider for traffic generated to its number.

Even a less imaginative carrier like AT&T recognizes the value of encouraging use of its services by information service providers and gives them financial incentives where it thinks competition requires. Under its Terminating Switched Access Arrangements, AT&T makes payments to entities that receive large volumes of calls over the AT&T network if the recipient connects its locations to AT&T by means of dedicated access. The TSAA payment rate is based

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[5] *See also AT&T Communications Tariff F.C.C. Nos. 1 and 2; Revenue Volume Pricing Plan and Customer Specific Term Plan*, 5 FCC Rcd 130 (1989).

[6] *Telemedia News & Views*, June, 1994, Vol. 2, No. 6.

on a percentage of the terminating switched access charges the arrangement enables AT&T to avoid by bypassing the local LEC.[7]

The biggest and most widely known example of the providing of incentives to parties to encourage them to get other parties to use a particular carrier's services is MCI's Friends and Family Plan, which is a mechanism that rewards virtually anybody who helps MCI find new subscribers. Under this plan, MCI provides discounts for calls to parties within a "Calling Circle" of other parties who have become MCI subscribers. In essence, MCI provides financial incentives for each of its Friends and Family subscribers to secure more subscribers for MCI. More than 11 million people have joined this very popular program. The Commission has recognized the program as an "innovative calling plan."[8] Not only are no premium charges imposed, but every caller participating benefits by receiving discounts. Such marketing innovation has been highly praised and certainly should not be discouraged in the future.

The proposed redefinition here uses the exceedingly broad term "information service" that is defined in Section 3(20) of the Communications Act as the Congress defined information services in Section 3(20) of the Act as the

> offering of a capability for generating, acquiring, storing,

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[7] The program apparently involves such well known companies as Microsoft and Boeing. The full extent of such arrangements is unknown, however, due to AT&T's practice of obtaining non-disclosure agreements. There has, of course, been no general need for public disclosure under Commission policy to date. Needless to say, however, consideration of the instant proposal would have the effect of invalidating many such proposals despite the Commission's dearth of knowledge as to impact. It would be extraordinarily difficult to enforce such a drastic new policy in a truly non-discriminatory way in the absence of complete knowledge of traffic stimulation incentives by all carriers.

[8] *Expanded Access for Interstate Special Access*, 7 FCC Rcd 7369, 7379 (1992).

> transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

The definition is so broad, that it appears to include such common uses as a personal answering machine, a personal computer or a fax placed on a telephone line. These all offer a "capability for...acquiring, storing, transforming, processing...or making available information by telecommunications." Thus, virtually any communications service in which a using party receives some financial benefit when another party calls would be subject to the Commission's redefinition and thus need to be replaced by 900 service. A subscriber to MCI's Friends and Family Service would thus be receiving a financial benefit from MCI every time one of his designated family or friends called a line with an answering machine. The millions of people who have received such incentives under this program who use answering machines, computers or fax machines may be surprised to discover that, under the Commission's instant proposal, they would be violating the law. They would find it exceedingly difficult to understand what the Commission was achieving by interdicting such a popular and demonstratively widely appreciated service. MCI would find it virtually impossible to distinguish which of its 11 million Friends and Family subscribers might be considered providers of "information services" under the statute's broad definition. When it did identify such subscribers it undoubtedly would have enormous difficulty explaining to them why the FCC was requiring them to lose the service they ordered and making them use 900 service instead.

While conceivably, the staggering overbreadth of the instant proposal could be reduced by further qualifying the term "information service," wherever a line was drawn would involve suppression of not merely existing but also future services that have not even been devised as yet. There is no public benefit that would begin to justify this plunging back into a world of excessive regulation. Such diverse parties as Consumer Reports, AMEX, Hyatt, Paramount, Revlon, United Way, Apple, Microsoft, American Forestry Association, American Red Cross, and the Pope have 900 lines, and the list is constantly growing to include doctors, lawyers, tax specialists, etc. The diversity of information is expanding. Included among information services are such things as gardening information, consumer alert, back pain information, legal advice, tax tips, medical hotline, auto repair information, pet information, workout information, dental information, home repair hotline, motivational hotline, sports information, soap opera updates and real estate information. New information services appear constantly and no one can be sure which services will be the most successful and durable. Ultimately the marketplace will decide -- unless, of course, the Commission prevents it from doing so.

Some of those services can be provided by carriers willing to forego charging a premium for callers as an incentive to increase traffic on their systems. If those carrier are willing to offer the public that benefit, the Commission should not prevent them and require the callers to spend their money unnecessarily to enrich an entrenched 900 service provider like AT&T. Such regulatory intervention in an increasingly large and diverse market would be totally mis-directed. There is no public interest in preventing telecommunications carriers from finding ways to get others to make use of their services more attractive. This is how new competitors, such as the Commentors here, expect to gain traffic and revenues in the new local exchange environment. New information services of unproven financial value are more likely to need communications alternatives that involve no premium charges. If their alternatives are artificially limited to 900 service and its substantial charges, they will not be started at all. A sports hotline, for example, for a small college with limited number of alumni across the nation may not justify the expense of a 900 service. Such a hotline, however, would be justified if no-premium service were available. The alumni would be most gratified, as would their college. The young carrier with the imagination to encourage such a service to put traffic on its lines would also benefit and, by becoming a more capable competition as a whole, would benefit the entire public. Similarly, a service providing updated information on research and treatments for less prevalent diseases and allergies may be economically feasible on a non-premium service but not on 900 service.

Even the writers of Paragraph 47 are forced to acknowledge a handful of free information services that they deem OK -- "local time or weather, movie theater information, product information, or airline flight information." That their list of tolerable information services is so short, however, seems to suggest a striking lack of imagination that only serves to illustrate why private parties should be left free to innovate new services without being restrained by the cold hand of bureaucracy. Congress had it right -- information services generally are good and should be encouraged. It is not appropriate for Government to decide which information services are good services and which are bad services, any more than it would be for Government to decide which telephone calls are good calls and which are bad calls.

B. The "Redefinition" is Anticompetitive

It would be profoundly anticompetitive to coerce the public into using 900 service that is dominated by AT&T. The Commission's unfortunate First Report and Order and Further Notice of Proposed Rulemaking in Telephone Number Portability (FCC 96-286), released July 2, 1996, leaves 900 service as the only significant national communications service without the benefit of number portability. Such portability is critical to competitive entry, as was made strongly apparent in the earlier battle for 800 service portability. See Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5905 (1991). The lack of number portability for 900 service is an even greater barrier to competition, since information services are more highly dependent upon advertising of specific 900 services and parties would lose their advertising investments if required to relinquish particular 900 numbers. There are no 900 service directories like there are 800 service directories. Customers who have used AT&T's 900 service face the loss of their advertising investment if they consider changing later to another carrier despite the fact that the other carrier's service may be cheaper or otherwise more attractive. Potential customers who might consider ordering service from a small and little known carrier are also discouraged from doing so by the realization that their investments in promoting a specific 900 number will be lost if they decide to change carriers in the future.

The Commission's Portability decision (at §28) recognizes that number portability provides consumers flexibility in the way they use their telecommunications services and promotes the development of competition among alternative providers of telephone and other telecommunications service. While the Commission recognizes the ultimate necessity to achieve such portability, it merely puts the issue on ice by referring it for a year to an unproven industry committee, without taking any affirmative steps or imposing meaningful deadlines.[9] The

[9] Teleservices Industry Association filed its petition for rulemaking to make 900 numbers portable. RM No. 8535 (filed Oct. 18, 1994). FCC Public Notice 2037, Mimeo No. 50358 (Oct.

experience of the last generation has amply illustrated that AT&T will fight every competitive challenge to its dominance until the Commission or the courts make it cut it out. As it stands, 900 service remains profoundly non-competitive. If the Commission is not prepared to rectify that condition, it should at least refrain from artificially building up this last vestige of monopoly service at the expense of new competitors and the public.

The proposal would thus inhibit the development of creative arrangements for promoting traffic generation that the Commission has hitherto supported and which are the natural concomitant of a vigorously competitive marketplace. It is not entirely adventitious that, at the time the Commission issued its instant Order proposing the suppression of competitive alternatives made possible by marketing incentives to 900 services, AT&T began an advertising offensive to promote its 900 services.[10] The proposed "redefinition" would serve the narrow self-interest of AT&T and do nothing worthwhile for the public.

25, 1994). In its Notice of Proposed Rulemaking, released July 13, 1995 in CC Docket No. 95-116, the Commission expressed its tentative conclusion "that service portability of 900 and 500 numbers is beneficial for customers of those services." 10 FCC Rcd 12350, 12353-4. "When end users attach a significant value to retaining their telephone numbers while changing service providers, a lack of number portability would deter entry by competitive providers of local services." at 12358. "It appears unlikely that market forces alone will drive the development and deployment of a number portability solution." at 12361. "Service provider portability for these services [500 & 900] will allow customers to respond more readily to service and price differences among service providers, thereby promoting competition and efficiency in the provision of 900 and PCS N00 services." at 12372. The fact remains, however, that, after two years, nothing real has been done to eliminate this impediment to the development of competitive alternatives.

[10] AT&T ads appeared in *Business Week*, *Technology and Fortune*, *Bank Management*, *U.S. Banking*, *Government Technology*, and *Governing and Service News*. AT&T also launched a direct mail effort to promote 900 service.